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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

RONNIE G. VAIL, RICHARD DIXON
BRUCE LILLIQUIST, LARRY STANLEY,
DARYL COOPER, TIMOTHY GARTLAND
and all others similarly situated,

Petitioners,

v.

JESSE BROWN, Secretary of Veterans Affairs

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID A. LEEN
Counsel of Record
Leen & Moore
520 E. Denny Way
Seattle, WA 98122
(206) 325-6022

DOUGLAS P. RADUNZ
2410 Centre Village
431 South Seventh Street
Minneapolis, MN 55415
(612) 337-5353

aBCD Legal Printers, Seattle, Washington

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QUESTION PRESENTED FOR REVIEW

Minnesota law bars deficiency judgments following non-judicial residential foreclosures of purchase-money mortgages. Under its home loan guaranty program, the Department of Veterans Affairs instructs lenders to foreclose non-judicially and to bid at the foreclosure sale in an amount less than the loan balance. This procedure creates a deficiency without affording the veteran any notice of a potential deficiency or any opportunity for a hearing to present evidence of the value of the collateral or otherwise defend the foreclosure. The question presented is: Does the the Due Process Clause prohibit the VA from collecting, by set off against disability and other entitlements, deficiency claims which have been established without notice or any opportunity to be heard?

LIST OF PARTIES

The caption contains the name of all included parties to the proceedings below, but the matter has been certified as a class action pursuant to F.R.Civ.P. 23(b)(2) and contains approximately 3,000 individual veterans.

It should also be noted that a petition for certiorari, in *Davis v. United States and Jesse Brown, Secretary of Veteran Affairs*, No. _____, has been filed this term by a similar class of Wisconsin veterans. Although the principal issues are not identical in the two cases, both arise from the VA's attempts to collect "deficiency" amounts from insured veterans following foreclosure of VA insured home loans. Related issues of law will be considered if this Court grants the writ in both cases. This Court may wish to discuss those cases at the same conference.

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OPINIONS BELOW

The first opinion of the United States District Court for the District of Minnesota (Appendix A) is reported at 742 F.Supp. 1039 (D. Minn. 1991). The decision of the Eighth Circuit Court of Appeals following the government's appeal of that decision is reported at 946 F.2d. 589 (8th Cir. 1991) amended by 956 F.2d 812 (8th Cir. 1992) (Appendix B). On remand, and assignment to The Honorable James M. Rosenbaum following the death of The Honorable Edward J. Devitt, the District Court's opinion is found at 841 F.Supp. 909 (D. Minn. 1994) (Appendix C). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 39 F.3rd 208 (8th Cir. 1994) (Appendix D).

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertient portions of the following statutes are set forth in Appendix E.

1. Amendment V to the Constitution of the United States.

2. Minnesota Statutes Annotated §580.225.

3. 38 U.S.C. 3720(a)(6).

4. 38 U.S.C. 3732(a).

5. 38 C.F.R. 36.4323(e) provides:

6. 38 C.F.R. 36.4320(f):

I. STATEMENT OF THE CASE

A. INTRODUCTION

In this case, a several thousand member class of veterans challenge VA deficiency assessments and collection by administrative set-off against disability and retirement benefits and other entitlements, undertaken without adequate notice and an opportunity to be heard in violation of the Fifth Amendment to the United States Constitution. At the VA's direction, the foreclosures are conducted nonjudicially pursuant to Minnesota laws §580, et seq. The VA's determination of the "net value" of the veteran's home (the collateral), which ultimately fixes the deficiency amount assessed against the veteran, occurs in conjunction with the non-judicial foreclosure and is completed without notice or an opportunity to be heard. 38 U.S.C. §3732(c). The

veterans are, therefore, deprived of any meaningful opportunity to be heard.

This action was commenced on September 5, 1989 by six individuals on behalf of themselves and a class of similarly situated veterans against whom the VA sought indemnity claims following non-judicial foreclosure of their home mortgages in Minnesota. The class sought relief based upon Minnesota law, which provides that any post-foreclosure deficiency against the veteran borrower is waived, if the state non-judicial procedure is used to foreclose. The veterans also alleged that the procedure violated due process.

The District Court (Dist. of Minn., 3rd Div., the Honorable Edward J. Devitt) certified the class, and ruled in favor of the veteran class on cross motions for summary judgment adopting Minnesota law as the federal rule of decision. *Vail v. Derwinski*, 746 F. Supp. 1041 (D. Minn. 1991) following *United States v. Kimbell Foods*, 440 U.S. 715 (1979). The District Court held that, because Minnesota law requires a waiver of any deficiency, if foreclosure is done non-judicially, the use by VA-insured lenders of the state non-judicial foreclosure bound the VA, and thus

prevented post-foreclosure indemnity claims by the VA for any claimed "deficiency". The court recognized that the VA had a choice under Minnesota law to foreclose judicially and obtain a deficiency.

The government appealed that decision and on October 8, 1991, the Eighth Circuit affirmed the District Court on different grounds than the District Court, holding that the veterans were not entitled to any of the debtor protections under state law but, because the VA directed and controlled the foreclosure process, the lack of pre-foreclosure notice and hearing violated the plaintiffs' Fifth Amendment rights to due process of law. *Vail v. Derwinski*, 946 F.2d 589 (8th Cir. 1991) amended by 956 F.2d 812 (8th Cir. 1992), hereinafter, *Vail I.*

Thereafter, on remand the District Court (the Honorable James M. Rosenbaum) issued an order implementing the Eight Circuit opinion (Appendix C). *Vail v. Brown*, 841 F. Supp. 909 (D. Minn. 1994). The District Court held that certain VA-generated letters were adequate to meet the notice requirements of due process despite the fact that the time and place of the foreclosure were not specified. 841 F. Supp. at 913.

Prospectively, however, the District Court ordered the VA to improve these notices. 841 F. Supp. at 915.

Finally, the District Court held that due process did not entitle the veteran plaintiffs to any pre-foreclosure hearings, 841 F. Supp. at 915. The District Court ordered that the VA administratively determine those class members to whom no pre-foreclosure notice was sent, and ordered remission of any outstanding indebtedness and refunds, plus interest, to those class members from whom collections have been made. 841 F. Supp. at 915, 917.

The veterans appealed to the Eighth Circuit, challenging only that portion of the District Court's order that denied veteran debtors an opportunity to be heard regarding the establishment of the deficiency debt claimed by the VA. The Court of Appeals, 38 F.3rd 208, affirmed the District Court (hereinafter *Vail II*) in all respects holding that, although the veterans were entitled to due process protection, including notice of the foreclosure, no hearing was required. The veterans were left with no protections under state law and no protections under federal law although they were to

receive notice of this unenviable situation. It is from this limited ruling that the veterans petition this court.

B. THE MATERIAL FACTS

1. The VA Home Loan Guarantee Program.

The VA guarantees, up to a specified maximum amount, home loans made to veterans by private lenders. 38 U.S.C. § 3701. The veteran pays, as part of the closing costs, a fee to the VA for this guarantee. 38 U.S.C. § 3703.[1]

In the event of a default by either the veteran borrower or a subsequent purchaser, the lender is required to give the VA at least thirty days' notice before starting foreclosure proceedings. 38 U.S.C. § 3732(c)(3) (1991); 38 C.F.R. § 36.4317 (1993). The VA then has fifteen days to instruct the lender how to proceed. 38 C.F.R. § 36.4324 (1993). The applicable regulations give the VA freedom to direct and control

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[1] For all of the veterans affected by this class action, the applicable fee was one percent of the amount of the loan. In 1989, Congress amended the law to raise the guarantee fee to 1.25 percent of the loan (except for disabled veterans who paid no fee), and to prohibit collection of any "deficiency" for loans closed after December 18, 1989. Section 303 of The Veterans Benefits Amendments of 1989, Pub. L. No. 101-237, Title III, 103 Stat. 2071-2072.

the foreclosure process the lender uses, and includes the right to intervene. The lender can lose its right to the guaranty if the VA's instructions are not strictly followed. 38 C.F.R. 36.4324(f); *United States v. Church*, 736 F.Supp. 1494 (N.D.Ind. 1990). Foreclosure must be conducted pursuant to the applicable state foreclosure laws. 38 U.S.C. § 3720(a)(6) (1991). Despite this requirement, the VA can avoid the effect of all state law debtor protections[2]. Although no statutes or regulations provide for or require notice by the VA to veteran borrowers prior to the foreclosure sale particularly as to the VA's intention to seek a deficiency despite state law to the contrary, the VA claims[3] to mail a notice when a default occurs[4], and a second notice when the lender has elected to

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[2] *Carter v. Brown*, 987 F.2d 611 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 78, 126 L.Ed.2d 46 (1993); *Vail v. Derwinski*, 946 F.2d 589 (8th Cir., 1991, amended by 956 F.2d 812 (8th Cir., 1992).

[3] The District Court's decision below appropriately ordered administrative hearings - with the burden of proof on the VA - to establish if, and to whom, any pre-foreclosure notices were sent by the VA. 841 F. Supp. 909 at 915.

[4] VA Form 26-8761.

foreclose.[5] A separate document, the so-called "Whitney letter"[6] is intended to notify veteran borrowers who have sold the home that the present owner of the property is in default, and that foreclosure "appears probable". *Vail v. Brown*, 841 F.Supp. 909 at 914. None of these documents indicate the date, time, or place of the foreclosure sale, nor do they alert the veteran that a "net value" calculation has been made by the VA that will likely result in a deficiency claim against him or her. The notices refer to a "probable" foreclosure, or an "intention" to foreclose. None of the notices offer the veteran a chance to contest the loan default or decision to foreclose, nor offer an opportunity for a hearing; they only offer encouragement to arrange to cure the default. Significantly, the VA's notices never inform veterans that the state law protections in

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[5] VA Form 26-8762.

[6] In *United States v. Whitney*, 602 F.Supp. 722 (W.D.N.Y., 1985), the court held that due process prevented the VA from recovering deficiency/indemnity claims when the VA had not made a reasonable attempt to provide personal notice of the foreclosure to a veteran not in possession of the subject home, a common circumstance in this class action.

the foreclosure laws that the VA directs the lender to follow do not apply.

Prior to the actual non-judicial foreclosure sale, the VA computes the "net value" of the property, and instructs the lender to bid this amount at the foreclosure sale. 38 C.F.R. § 3732. Neither the regulations nor actual practice give the veteran debtor any opportunity to be heard in this valuation process; the veteran never receives notice of the amount the VA has directed the lender to bid at the sale, or the basis for that bid amount. The "net value" calculation by the VA consists of not only an informal appraisal of the fair market value of the property by VA personnel, but a reduction for the anticipated costs to the VA of holding, maintaining, and liquidating the property after foreclosure. 38 U.S.C. § 3732(c)(1)(c) (1993).

If the "net value" bid by the lender is less than the outstanding mortgage debt (and that was the case, by definition, for each member of this class), the VA is obligated by its guaranty to reimburse the difference to the lender, up to the maximum guaranty amount. 38 U.S.C. § 3732(c) (1993); 38 C.F.R. § 36.4321 (1991). By regulation, this payment on the guaranty

automatically becomes a "...debt owing to the United States by such veteran." 38 C.F.R. 36.4323(e). As soon as the debt is established in this way, the VA deducts the debt from entitlements due to the veteran by the United States, including offset of disability, retirement benefits, federal (and military) wages, and tax refunds. *Vail v. Brown*, 841 F. Supp. 909 at 912, citing *Vail v. Derwinski*, 946 F.2d 589 at 590. Disabled veterans are the single largest class of veterans whose benefits are summarily taken.

The first - and only - opportunity the veteran borrower (now debtor) has to be heard regarding the VA's claim occurs long after the establishment of the debt, the foreclosure, the payment on the guarantee by the VA to the lender, in the context of the VA's waiver program.[7] The waiver process considers the veteran's ability to pay the debt, and allows a waiver only if, in the opinion of the VA, a waiver meets a standard of "equity and good conscience". 38 C.F.R. §

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[7] The regulations allow the veteran debtor - again, after the amount of the debt has been established (after the foreclosure sale) - to challenge the "existence" of the debt. However, this can only be done "informally", and no hearing, nor any appellate rights, are provided. 38 C.F.R. § 1.911(c).

1.965(a)(3). Until 1992, the law prohibited a veteran from even hiring an attorney to assist in the waiver process; thus, all of the plaintiff class members in this case were denied the assistance of an attorney.[8]

The waiver "hearing" is conducted by VA employees selected from the debt collection departments of VA regional offices; neither hearing examiners nor administrative law judges are utilized. 38 C.F.R. § 1.955(e)(2). Appellate review of adverse waiver decisions is appealable to the Board of Veterans Appeals, the Court of Veterans Appeals, and the Court of Appeals for the Federal Circuit. 38 C.F.R. § 1.912; 38 U.S.C. §§ 7252, 7293 (1993). The few veterans who actually receive a waiver, however, are subsequently greeted with an IRS Form 1099 advising the IRS that the forgiveness of indebtedness constitutes taxable income, placing many veterans in a worse position than before the waiver. See, VA General Counsel's Precedent Opinion 54-91 (May 8, 1991).

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[8] In 1992 Congress rescinded the prohibition on attorney representation. 38 U.S.C. § 5904.

2. Minnesota Foreclosure Law.

In Minnesota, the foreclosure of a loan secured by a VA guaranteed loan may be accomplished by either a judicial foreclosure under MSA 581.01 et seq. or a non-judicial foreclosure. When the non-judicial foreclosure procedure is used, no deficiency after sale exists, regardless of the amount realized by the foreclosure sale. MSA §580.225

The differences between the judicial and non-judicial procedures are significant. The judicial foreclosure requires approval of the sale by a court before the foreclosure sale occurs, and requires personal service on the debtor of notice of the proceedings. The debtor is afforded a full opportunity to appear and present all relevant evidence *prior* to the foreclosure sale. Due process is thus fully satisfied. Non-judicial foreclosure, on the other hand, occurs without any opportunity for the debtor to challenge the amount bid by the lender at the sale. MSA § 580 et. seq. These differences are a part of a delicate balance between the rights/responsibilities of both debtor and the creditor established by the Minnesota legislature:

> The legislature was not unmindful, however, of the potential for harm possessed by a mortgagee with a power of sale and of the enhanced likelihood of a windfall under the shortened redemption period. It therefore limited availability of deficiency judgments in cases where the 6-month period applied by providing that if the mortgagee purchases the property at the sheriff's sale, he waives his right to such a claim.

American National Bank v. Blaeser, 326 N.W.2d 163, 164-165 (Minn. 1982).

All of the foreclosures involved in this litigation occurred under the authority of MSA §580, the non-judicial foreclosure statute. The VA has collected from class members, by means of set-off against government benefits, over $2 million which the veterans contend should be returned because it was assessed and collected without notice or an opportunity to be heard.

II. ARGUMENT FOR ALLOWANCE OF CERTIORARI

This court should grant the petitioners' application for certiorari for at least two reasons: (1) Important questions of constitutional law are involved which would affect hundreds of thousands of veterans

across the nation; and (2) the Circuit Courts of Appeal (and District Courts) have issued conflicting rulings in applying Fifth Amendment due process in the context of a VA directed nonjudicial foreclosure.

III. ARGUMENT

1. THE VA PROCEDURES IN PLACE DO NOT FULLY SATISFY THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT.

Both the *Boley* and *Vail I* courts (and many other cases and commentators cited *infra*. that have considered the issue) have determined that VA involvement in controlling the foreclosure proceedings, determining the value of the property, and issuing bid instructions to foreclosing trustees constitutes government action sufficient to require due process of law. 946 F.2d 589. *Boley v. Brown*, 10 F.3rd 218 (4th Cir. 1993). In *Vail I* the court found that "state action is supplied by the VA's involvement in ordering foreclosure." 946 F.2d 589 at footnote 9. The *Boley* court held that such state action triggers due process protections. The veteran in that case "...had a legally protected property interest in the foreclosure proceedings" and "was entitled to notice

of the foreclosure proceedings 'reasonably calculated, under the circumstances, to apprise [the veteran] of the pendency of the action and afford [the veteran] opportunity to [protect this interest].[9]'" 10 F.3rd at 222.

To suggest, as the VA did below, that the lender and the VA operate exclusive of one another is to fundamentally misinterpret the foreclosure process. The *Boley* and *Vail* courts have resolved this issue against the VA. In *Vail* I, it was the "government participation in this type [non-judicial] of foreclosure [that] raises serious due process questions". 946 F.2d at 593. Moreover, the net value determination, which is done by the VA, not the lender, 38 U.S.C. §3732(c)(1)(c) (1993), is the most significant part of the foreclosure process because it triggers the indemnity claim. The foreclosure sale itself simply puts the final nail in the

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[9] Accord, *Johnson v. USDA*, 734 F.2d 774 (11th Cir. 1984); *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976); *United States v. Ford*, 551 F. Supp. 1101 (N.D. Miss. 1982); *United States v. James D. Good Real Property*, 114 S. Ct. 492 (1993). Accord, *United States v. Whitney*, *infra.*, and *United States v. Murdock*, *infra*; see generally, Leen, et al., "Due Process and Deeds of Trust: Strange Bedfellows", 48 Wash. L.Rev. 762 (1973).

veteran's coffin in fixing the deficiency. In *United States v. Whitney*, 602 F. Supp. 722 (W.D.N.Y. 1985), cited with approval by the court in *Vail I*, the court held that the government's "intimate complicity" in the violation of the defendant's statutory and constitutional rights through the foreclosure process defeated the VA's claim of deficiency. This is a case that the VA cites with approval and whose holding it followed in its internal regulations. See VA Circular 20-86-14, May 5, 1986. Further, the court in *United States v. Murdock*, 627 F. Supp. 272 (N.D. Ind. 1985), stated that:

> the "intimate complicity" sufficient to extinguish the government's indemnification rights can be found in such simple acts as failure to recognize the veteran's constitutional right to notice in the VA's regulations and in failure to inform the veteran once notice of the foreclosure is received.

These cases establish the VA's significant involvement in the foreclosure process as well as the veterans' rights to due process. The question comes down to: What process is due?

An opportunity to be heard is undeniably the most important part of the procedural due process

required. In *Johnson v. US Dept of Agriculture*, 734 F.2d 774, 782 (11th Cir. 1984), which challenged the use of non-judicial foreclosure in government loans, the court held that "at a minimum, due process assures notice and a meaningful opportunity to be heard before a right or interest can be forfeited." In *Johnson*, the court noted that the government could easily provide due process by using the state judicial remedy. 734 F.2d at 783. That very option exists in Minnesota.

In order to determine what process is constitutionally due in particular cases, this Court has held that several factors need to be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Most recently, in *Zinermon v. Burch*, 494 U.S. 113, 127 (1990), this Court noted that in "applying this test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." (emphasis in original). For the "root requirement" of due process is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest." (emphasis in original). *Id.*, at 127 (quoting *Parham v. J.R.*, 442 U.S. 584, 606-607 (1979). This Court has also noted that within the context of such a hearing "due process requires a neutral and detached judge in the first instance'". *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2277 (1993)[10].

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[10] In the context of other federal administrative agency actions where a hearing is required by either statute or constitutional law, the Administrative Procedure Act prescribes the procedures to be followed. 5 U.S.C. §554. Due process principles require that a hearing be provided, *Mathews v. Eldridge*, 424 U.S. 319 (1976), in cases where the APA governs. The APA requires that "persons entitled to notice of an agency hearing shall be timely informed of...the time, place, and nature of the hearing," and "the matters of fact and law asserted." 5 U.S.C. § 554 (b) (1) & (3). Further the agency "shall give all interested parties opportunity for...the submission and consideration of facts, arguments, offers of settlement, or

It is the VA's duty, therefore, to establish that these due process requirements are met in the VA foreclosure proceedings. Here, the veterans are being deprived of a basic requisite of due process, a meaningful opportunity to be heard. They are not able to participate in the proceedings meaningfully because they are not able to influence in any way the net value determination. Most significantly, the VA has not advanced any reason for not providing these procedural protections which this Court has clearly mandated. The VA has not established, nor even claimed, that it is not in a position to provide for pre-deprivation process, only that it need not.

The District Court held, and the Eighth Circuit affirmed, that the notice provided by the VA is

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proposals of adjustment when time, the nature of the proceeding, and the public interest permit..." 5 U.S.C. § 554 (c) (1). Also, the "functions of presiding employees and of employees participating in decisions...shall be conducted in an impartial manner." 5 U.S.C. § 556 (b) (3). Expanding upon this point, the APA also states that an employee presiding and making the initial decision may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. §554 (d)(2). The court in *Johnson* noted that a "fair hearing" requires an "impartial arbiter". 734 F.2d at 782.

"sufficient to permit the veteran to participate in the foreclosure sale and to exercise his or her pre-foreclosure options." 841 F. Supp. at 915. This is wholly illusory as there are no opportunities to participate in the process (as it is non-judicial) nor can there be input at the most crucial stage, of the net value determination. If the veterans are not able to participate at this stage of the process, they cannot protect their interest, which the Court stated is to "ensure that fair value is received" for the property. *Vail I*, 946 F.2d at 593. The VA erroneously assumes, as did the District Court, that there is some opportunity under state law to "participate" in the process. This is simply not correct. There is no other opportunity to be heard, as the process is "non-judicial." By enacting an anti-deficiency provision when non-judicial foreclosure is used, the Minnesota Legislature eliminated the protections dealing with the value of the property because that was legislatively established as the amount of the debt. When this protection was eliminated in *Vail I*, the remaining portion of state law left homeowners completely unprotected from large deficiencies because,

historically, foreclosed properties never obtain fair value, especially if the VA is the only bidder.

The "waiver" hearings are not a substitute for fair hearings for a number of reasons. The VA concedes that when a veteran informally challenges the validity of a debt, no hearing of any kind is provided. A veteran receives a hearing only in the case of a request for hardship waiver of the debt. Such a waiver constitutes forgiveness of the debt and is fully discretionary. Solvent veterans are not eligible for a waiver. Essentially, the waiver hearings are charity, not a determination of the merits of the VA's contentions. 38 C.F.R. § 1.964 (a)(2). The hearings are not conducted before an impartial person as required by the APA. 5 U.S.C. §§554 and 556. The hearings are conducted before a committee which consists of VA employees from the "debt claim areas, whose very job is collecting deficiencies rather than forgiving such debt." 38 C.F.R. § 1.955 (e). Additionally, a waiver comes long after foreclosure and the establishment of the debt, often after money has been already been collected from the veteran by offset. The veteran cannot challenge the value of the property nor the validity of the debt because, by law,

the net value determination has been set. In turn, the payment to the lender has been made and indemnification amount is set. Also, because the class members' waiver hearings in this case took place prior to 1992, none were allowed to have attorney representation at the hearing. 38 U.S.C. §5904. Lastly, the VA reports any waiver granted to the IRS for tax purposes. The debt is reported as taxable income. Veterans, in turn, often pay out (or are compelled to pay) a significant amount in taxes on these "waived" debts. For these reasons, the waiver hearing does not provide any meaningful opportunity for the veteran to be heard.

For the government to suggest that the veteran has the opportunity to participate by purchasing the property (when the veteran does not even have funds to make the monthly payments on the property) is incredulous and seriously begs the question at hand: How to ensure that, if the property is foreclosed, the deficiency is reduced or eliminated. These veterans are in financial *extremis*. The class here includes only those against whom the VA has already assessed a deficiency. Thus, by definition, each class member has been unable

to purchase or otherwise redeem the property. It is nonsensical to suggest that these veterans have the option to buy the property at the sale. The only workable solution, taking into account the veterans' situations, is to enable them to "ensure that fair value is received" and possibly avoid or at least reduce the potential of incurring a debt to begin with. 946 F.2d at 593.

For a veteran to have a meaningful opportunity to be heard, the hearing must occur *prior* to the valuation of the property by the VA and the ultimate sale[11]. In order to have any meaningful impact on the foreclosure and the ultimate determination of a deficiency, the veteran must be involved in and aware of the net value determination which the VA now conducts without notice or hearing and without giving veterans notice of the determination until after the actual sale date. It is at this point, when the property is sold for less than the debt, that rights are inexorably determined. In order to have a meaningful impact on this crucial issue, the veteran must be in a position to argue and present

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[11] "This Court has not ... enbraced the general proposition that a wrong may be done if it can be undone ..." *Fuentes v. Shevis* 407 U.S. 67, 82 (1992)

evidence that the value of the property is equal to the debt, or at least more than the VA assesses it to be. The veterans would have no claim if the property is sold for the amount of the debt or greater, for then there would be no VA involvement (and thus no governmental action that causes a loss). The taxpayers are also obviously benefitted when the guaranty obligation to the lender is reduced or eliminated.

Due process is a flexible concept which calls "for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408, U.S. 471, 481 (1972). The requirements of due process are to be tailored to the interest in question. Here, the interest at stake, the veterans home, is a significant property interest. This interest demands significant procedural protections, but ones that can be provided for with ease.

As the veterans argued below, state law provides convenient solutions insofar as a full hearing is part of the Minnesota foreclosure process. Alternatively, "nonjudicial foreclosure can be made valid by holding an administrative hearing patterned after *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d (1970)...." *United States v. Ford*, 551 F. Supp. 1101

(N.D. Miss. 1982). Since the VA argues that it provides a sufficient hearing associated with the waiver (after the foreclosure); it can certainly provide a hearing that satisfies due process *prior* to the foreclosure and permit the veteran to argue the value of the collateral or to challenge the net value determination. The VA must allow the veterans to take advantage of one of these options if it is to meet the Fifth Amendment's due process requirements. For "in cases ... where the veteran has long since transferred the property to a third party who has fallen behind in the payments, the veteran cannot be held liable under a perpetual guarantee agreement for the outcome of a foreclosure proceeding as to which he was provided no adequate notice ... the constitutional guarantee of due process of law forbids it, and justice cries out against it." *United States v. Whitney*, *supra*, at p. 735.

2. There is a Conflict Between Lower Circuit Courts as to Whether and to What Extent Due Process Protects Veterans Under the Home Loan Program.

The VA Home Loan Program has been the subject of considerable litigation, particularly where it

conflicts with state foreclosure law[12]. Although in *U.S. v. Shimer*, 367 U.S. 374 (1961)[13], this Court held that a Pennsylvania anti-deficiency law did not defeat a VA indemnity claim, many District Courts identified the limited reach of *Shimer*.[14]

Applying due process has been equally problematical. In *Whitney* and *Murdoch*, both *supra*, District Courts found sufficient governmental action to

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[12] *U.S. v. Vallejo*, 660 F. Supp. 553 (D. Wash. 1987); *U.S. v. Whitney*, *supra*; *U.S. v. Murdoch*, 627 F. Supp. 272 (N.D. Ind. 1985); *Whitehead v. Turnage*, 701 F. Supp. 795 (W.D. Wn. 1988) affirmed 904 F.2d 1372 (9th Cir. 1990) then overruled, *Carter v. Brown*, 987 F.2d 611 (9th Cir. en banc 1993) *cert denied* 114 S. Ct. 7 (1993) (the District Court in *Carter* had rejected *Shimer* and followed *Kimbell Foods* as did the District Court in this case and in *Davis v. Derwinski*, 756 F. Supp. 1162 (E.D. Wisc. 1991) reversed 961 F.2d 603 (7th Cir. 1992), *cert. pending*. The *en banc Carter* opinion was closely divided.

[13] In *Shimer*, decided in 1961 by a divided court, this court last considered the veteran's obligations following a foreclosure under state law. Since that time Congress has undercut the rationale used by the Court in *Shimer* by enacting legislation directing the VA not to pursue deficiencies on loans closed after 1989. See footnote 1. Also, VA regulations, now accommodate state law imposed minimum bids. See 38 CFR 36.4320(f)

[14] See, Alexander "Federal Intervention in Real Estate Finance" 71 *N.C. Law Review* 293, 324-327 (1993) for a scholarly analysis questioning of the viability of *Shimer* in light of more recent legislations and decisions.

defeat VA indemnity claims after veterans had deficient notice. In *Vail I*, the Eighth Circuit followed the reasoning in these two cases, but later reversed itself in *Vail II* (with a different panel) on whether a hearing of some kind was necessary.

The most definitive ruling on the veteran's right under the due process clause is found in the Fourth Circuit's opinion in *Boley v. Brown*, *supra*:

> We conclude that Boley has a legally protected property interest in the foreclosure proceedings, including the hearing and the sale, by virtue of his obligations under the indemnity agreement. Boley had an interest in trying to avoid a determination that foreclosure was necessary at the foreclosure hearing and in seeing that fair value was received for the property at the foreclosure sale. Accordingly, Boley was entitled to notice of the foreclosure proceedings "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] opportunity to [protect his interests]". Mullane, 339 U.S. at 314, 70 S.Ct at 657. See also Vail, 946 F.2d at 594 (holding that "the VA must make a good faith attempt to provide reasonable personal notice to the indemnitor of the foreclosure sale before it can obtain a recovery under its

> indemnity contract")...The VA regulations, as currently written, do not provide for any notice of the foreclosure proceedings, either the foreclosure hearing or the foreclosure sale, to a third party liable to the VA under as indemnity agreement. The lack of any provision for notice in the regulations renders this portion of the VA's regulations constitutionally insufficient.

10 F.3rd at 222; see also, *Mortgage Associates v. Cleland*, 651 F.2d 476, 479 (7th Cir. 1981).

In the Ninth Circuit, however, the courts have rejected the application of due process. *Rank v. Nimmo*, 667 F.2d 692 (9th Cir. 1982) *cert denied* 459 U.S. 907 (1983). Remarkably, the court, in refusing to order the VA to follow its own regulations, and held that:

> ...we consider it most improbable that the VA act was intended to authorize the federal courts to create, with respect to the area of VA-guaranteed home loans, a federal common law of mortgages to supplement or supplant the law provided by the states.

677 F.2d at 697.

The court in *Carter*, *supra*, and over a strong dissent, then eliminated the state law debtor protections as well.

In *Murphy v. Brown*, No. CV-89-1-M-CCL, ____ F. Supp. ____ (D. Montana, October 3, 1994 - as yet unreported), the court, in following *Rank*, dismissed a veteran's class action seeking the same due process protections sought here. The only conceivable way to reconcile the federal pre-emption cases (*Shimer* and *Carter v. Brown*, both *supra*) with *Rank* is to assume that "Congress intended to confer upon the VA all rights and to strip the debtors of all remedies". Alexander, "Federal Intervention in Real Estate Finance", 71 *N.C. Law Review* 353 (1993).

Clearly, this Court, especially in light of the substantial due process rights conferred upon convicted drug dealers, should not accept this construction. The veterans, at the very least, should be able to rely upon either state law debtors protections or federal due process, if not both.

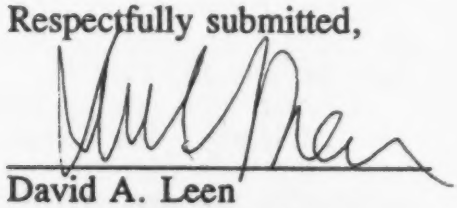
IV. CONCLUSION

Because the VA conceded that no class members were given any opportunity to be heard, this Court

should again affirm the original district court conclusion that the VA's indemnity rights have been extinguished where the veterans were denied due process. The VA conceded as the District Courts in both decisions have held (on loans closed prior to December, 1989), that remission of the debt is proper when due process has been denied. Accordingly, this Court should reverse the District Court's ruling denying veterans a hearing prior to non-judicial foreclosure and remand for proceedings to implement the veterans' constitutional rights.

DATED this 30th day of January, 1995.

Respectfully submitted,



David A. Leen
Counsel of Record
520 E. Denny
Seattle, WA 98122
(206) 325-6022

DOUGLAS RADUNZ
2410 Centre Village
431 So. 7th Street
Minneapolis, MN 55415
(612) 337-5353

APPENDIX A

Cite as: 742 F.Supp. 1039

Ronnie G. VAIL, Richard A. Dixon, Bruce Lillquist, Larry Stanley, Daryl L.
Cooper, and Timothy C. Cartland, individually and on behalf of all others
similarly situated, Plaintiffs,
v.
Edward J. DERWINSKI, or his successor, Secretary of the Dept. of Veteran's
Affairs, Defendant.
No. Civ. 3-89-609.
United States District Court,
D. Minnesota,
Third Division.
Aug. 25, 1990.

Military veterans brought class action against Secretary of Department of Veteran's Affairs, challenging acts of Department in seeking deficiency judgments against them personally following foreclosure by advertisement of their insured home mortgages due to default in loan payments by subsequent purchasers. Veterans and Secretary filed motions for summary judgment. The District Court, Devitt, J., held that Minnesota's antideficiency statute, which prohibits deficiency judgments on mortgages foreclosed by advertisement, precluded Department from exercising either its right to

subrogation or right to indemnity and seeking deficiency judgments against military veterans personally.

Veterans' motion granted; Secretary's motion denied.

David A. Leen, Seattle, Wash., and Douglas P. Radunz, Minneapolis, Minn., for plaintiffs.

Lonnie F. Bryan, Asst. U.S. Atty., D.Minn., for defendant Veteran's Admin.

ORDER

DEVITT, District Judge.

INTRODUCTION

In this action for declaratory relief, a proposed class of military veterans challenge the actions of the Department of Veteran's Affairs (V.A.) in seeking deficiency judgments against them personally following non-judicial foreclosure of their V.A. insured home mortgages following default in loan payments by subsequent purchasers.

The parties have stipulated to, and the court has signed, an order defining the class[1]. The parties agree the case

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[1] All individuals eligible for home loan guarantees or insurance provided pursuant to Title 38, United States Code, Chapter 37, against whom the United States or its agencies have asserted or will assert a claim pursuant to 38 C.F.R. s 36.4323(e) or indemnity agreement, which claim has been or will be generated because of a claim paid by the United States to a lender who submitted such claims to the United States because of a mortgage foreclosure conducted in the State of Minnesota subject

is ripe for decision on summary judgment. There are no factual disputes. Each has filed summary judgment motions. Briefs have been lodged and oral argument heard.

BACKGROUND

The VA provides housing assistance to veterans by guaranteeing home loans made to veterans by private lenders. See generally, 38 U.S.C. s 1801-33 (West 1979 & Supp.1990); 38 C.F.R. Part 36 (1989). The availability of V.A. loan guaranties makes possible the purchase of homes by veterans who might otherwise have difficulty securing home mortgages.

The plaintiffs in this action are military veterans who purchased homes in Minnesota that were financed by private lenders. A portion of the mortgage loan was guaranteed by the V.A. Each plaintiff signed a contract

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to the anti-deficiency provisions of Minnesota law including but not limited to Minnesota Statutes s 582.30 or former s 580.23 subd. 1, but excluding any claims based upon foreclosure of mortgages closed after December 31, 1989. This class will include the following subclasses: SUBCLASS # 1: Those individuals, included in the above class, against whom a final judgment has been entered in a court of law on such claim. SUBCLASS # 2: Those individuals, included in the above class, from whom the VA has collected monies based upon a claim under 38 CFR 36.4323(e) or written indemnity agreement, by way of voluntary payment, offset of benefits, wages, tax refunds, or other collection efforts.

with the V.A. which contained a certification that the veteran had read and understood his liability on the loan, and provided: As a GI home loan borrower you will be legally obligated to make the mortgage payments called for by your mortgage loan contract. The fact that you dispose of your property after the loan has been made WILL NOT RELIEVE YOU OF LIABILITY FOR MAKING THESE PAYMENTS. V.A. Form 26-1802a. The contract also provided that the guaranty was subject to pertinent V.A. statutes and regulations. Each veteran was mailed additional information concerning his rights and liabilities.

In most cases, the individual plaintiffs sold their residence to a purchaser who assumed the V.A. loan and subsequently defaulted. The private lenders pursued non-judicial foreclosure actions (foreclosure by advertisement) under Minnesota law. Subsequently, the V.A. performed on its guarantee by paying monies to these private lending institutions.

The V.A. now seeks deficiency judgments against members of plaintiff class claiming an independent right of indemnity pursuant to 38 C.F.R. s 36.4323(e) and United States v. Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961). The V.A. did not pursue

subrogation claims under the notes. Plaintiff class contends that Minnesota's anti-deficiency statute, which prohibits deficiency judgments on mortgages *1041 foreclosed by advertisement, bans the V.A.'s actions in Minnesota.

DISCUSSION

Plaintiff class moves for summary judgment awarding them a declaratory judgment and permanent injunctive relief. Specifically, plaintiffs ask the court to enjoin the V.A. from asserting deficiencies in the future, and to require restitution of amounts previously paid by veterans. Defendant V.A. has filed a cross-motion for summary judgment.

Summary judgment is appropriate only where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Supreme Court recently held in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), that summary judgment must be granted where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265

(1986). Since no factual disputes exist, the law controls the outcome of plaintiff and defendants' cross motions for summary judgment.

Federal law governs questions involving the rights of the United States arising under nationwide federal programs. United States v. Kimbell Foods, Inc., 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979). The V.A.'s rights, as guarantor, upon default by a debtor veteran are governed by 38 U.S.C. s 1832. Section 1832 provides for a right to subrogation. [T]he Administrator may ... pay to [the lender] the guaranty not in excess of the pro rata portion of the amount originally guaranteed. If the Administrator makes such a payment, the Administrator shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty. Id. at s 1832(a)(1).

The federal regulations interpreting the statutory provisions provide two alternative courses by which the V.A. may recover the amount paid on the guaranty. In addition to the right to subrogation, the V.A. has a right to indemnity. A section entitled "Subrogation and indemnity," provides in relevant part: (a) The Secretary shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a

guaranty or on account of an insured loss, which right shall be junior to the holder's rights as against the debtor or the encumbered property until the holder shall have received the full amount payable under his contract with the debtor. No partial or complete release by a creditor shall impair the rights of the Secretary with respect to the debtor's obligation.

. . . . .

(e) Any amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. Chapter 37 shall constitute a debt owing to the United States by such veteran. 38 C.F.R. s 36.4323.

In this case, the V.A. may not exercise its subrogation right. The V.A.'s right to subrogation by definition derives from the lender's right. In a Minnesota non-judicial foreclosure, where the lender has no right to collect a deficiency, the V.A. has none either. In addition, the guarantee contract signed by each veteran fails to suggest anywhere that the veteran could be held liable to the V.A. for more than he or she would otherwise be required to pay a private lender. The contract language treats the duties and responsibilities of the V.A. and the lender as functionally equivalent. See

Whitehead v. Turnage, 701 F.Supp. 795, 797 (W.D.Wash.1988).

The V.A.'s primary claim is that it possesses an independent right of indemnity pursuant to 38 C.F.R. s 36.4323(e) and United States v. Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961). 38 C.F.R. s 36.4323(e) establishes the V.A.'s independent right of indemnity apart from its subrogation right under the guaranty. Furthermore, *1042 the Supreme Court in United States v. Shimer, supra, held that the V.A. has an independent right of indemnity apart from its subrogation rights under the guaranty.

A recent case from the Ninth Circuit, however, indicates that the V.A. is not free to exercise this right in all circumstances. In Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir.1990), the V.A. brought action to collect deficiencies remaining after default and foreclosure on home loans. The court held that the State of Washington's statutory scheme allowing a creditor to judicially foreclose (and receive a deficiency judgment) or nonjudicially foreclose (and forego deficiency judgment), was consistent with federal regulations and applicable to prevent the V.A., which had "directed" nonjudicial foreclosure of home loans it

had guaranteed, from subsequently seeking deficiency judgment from foreclosed-upon veterans. Id. at 1369[2]. The court's holding was based on the V.A.'s complete control of its power to be made whole when a state provides alternative methods of foreclosure. If a veteran defaults on a loan, the lender must give the V.A. thirty days notice before foreclosing. 38 C.F.R. s 36.4317. The V.A. then has fifteen days in which to notify the lender to proceed in "such manner as to effectively preserve the personal liability of the parties liable...." 38 C.F.R. s 36.4324(f). In the absence of notice by the lender, "an election and appropriate prosecution of legally available effective remedies with respect to the repossession or the liquidation of the security" will commence. Id.

The court then summarized: Because the VA directs the lender's choice between the two methods available in Washington, it is in complete control of its ability to be

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[2] The federal statute does not establish a federal foreclosure proceeding, but contemplates foreclosure under state law. See 38 U.S.C. ss 1820(a)(6) and 1832. Washington State law provides two foreclosure methods. In a non-judicial foreclosure, the lender may not proceed personally against the debtor to collect any deficiency. Wash.Rev.Code Ann. s 61.24.100. In a judicial foreclosure, the lender is allowed to seek a deficiency. Wash.Rev.Code Ann. s 61.12.070.

made whole. Given the availability of the judicial foreclosure alternative, which allows the VA to exercise its primary right to subrogation and proceed directly against the debtor, the VA may not choose the non-judicial foreclosure alternative, and then resort to its right to indemnity. Id. at 1369. (emphasis added). The court added that because the state provides an alternative which allows the V.A. to exercise its primary right to subrogation and receive the full measure of protection without displacing state law, the Washington scheme was consistent with federal law. Id.

Like Washington, Minnesota provides for foreclosure by advertisement pursuant to Minn.Stat. Chapter 580, which is a nonjudicial proceeding, or by action pursuant to Minn.Stat. Chapter 581, which is a judicial proceeding. In a judicial foreclosure, which is more time-consuming and expensive, the lender may obtain a deficiency judgment. Minn.Stat. s 582.30, subd. 1, (a)(2). On the other hand, if a lender proceeds with a non-judicial foreclosure, a deficiency judgment is generally not allowed. Minn.Stat. s 582.30, subd. 2[3].

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[3] If a mortgage is foreclosed by advertisement under Chapter 580, no deficiency judgment is allowed if the property has a redemption period of six months. The six month redemption period has very few exceptions, see Minn.Stat. s 580.23, subd. 2,

The parties agree that there is no relevant difference between the Minnesota and Washington foreclosure schemes.

It is also not disputed that the V.A. determines whether the loan foreclosure should be by advertisement or by judicial action. Although the V.A. does not participate in the actual foreclosure proceedings, 38 C.F.R. s 36.4319(f), the regulations governing the V.A. loan guarantee program clearly show the V.A.'s right to control the foreclosure proceedings. See generally, 38 C.F.R. ss 36.4317, 36.4324(f).

*1043 The Whitehead opinion is consistent with recent Congressional legislation aimed at holding good faith veterans unaccountable for deficiencies resulting from nonjudicial mortgage foreclosures. On December 18, 1989, President Bush signed into law the "Veterans Benefits Amendments of 1989," Public Law 101-237, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 2062. The act states that with respect to V.A. loans closed after December 31, 1989, veterans shall not be liable for any deficiency unless there is "fraud, misrepresentation, or bad faith."

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and those exceptions will rarely apply to V.A. foreclosures.

CONCLUSION

On this record,

The Court DECLARES

1. Defendant is without authority to enforce deficiency judgments against members of plaintiff class for loan guaranty payments made to mortgage lenders following non-judicial foreclosure of Minnesota real estate.

2. Plaintiffs' motion for summary judgment is GRANTED.

3. Defendants' cross motion for summary judgment is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX B

Cite as: 946 F.2d 589

Ronnie G. VAIL, Richard A. Dixon, Bruce Lillquist, Larry Stanley, Daryl L. Cooper, and Timothy C. Gartland, individually and on behalf of all other similarly situated, Appellees,
v.
Edward J. DERWINSKI, or his successor, Secretary of the Dept. of Veteran's Affairs, Appellant.
Nos. 90-5559, 91-1026.
United States Court of Appeals, Eighth Circuit.

Submitted June 12, 1991.

Decided Oct. 8, 1991.

Veterans brought class action against Secretary of Department of Veteran's Affairs to challenge Department's action seeking deficiency judgments following foreclosure by advertisement. The United States District Court for the District of Minnesota, 742 F.Supp 1039, Edward J. Devitt, Senior District Judge, granted summary judgment in favor of veterans. Secretary appealed. The Court of Appeals, Lay, Chief Judge, held that: (1) Department's indemnity right survived nonjudicial foreclosure by advertisement and was not barred by Minnesota's antideficiency statute, and (2) before Department could obtain recovery under indemnity contract, it was required to make good-faith

attempt to provide to veterans reasonable, personal notice of foreclosure sale.

Affirmed as modified.

Patricia Mack Bryan, argued (Stuart M. Gerson, Jerome G. Arnold, Mark B. Stern and Ann Southworth, on the brief), Washington, D.C., for appellant.

David A. Leen, Seattle, Washington, argued (Douglas P. Radunz, Minneapolis, Minn., on the brief), for appellees.

Before LAY, Chief Judge, RONEY, [FN*] Senior Circuit Judge, and WOLLMAN, Circuit Judge.

FN* The HONORABLE PAUL H. RONEY, Senior Circuit Judge for the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

LAY, Chief Judge.

This case involves a class action brought by military veterans who purchased homes under the VA home loan guaranty program. The district court[4] granted summary judgment to the class and enjoined the VA from obtaining a deficiency from the veterans under the VA's right of indemnity when the VA orders non-judicial

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[4] The Honorable Edward J. Devitt, Senior District Judge for the District of Minnesota.

foreclosure on VA home loans in Minnesota. 742 F.Supp. 1039. The plaintiff class members either defaulted on their loans or sold their homes to buyers who assumed the VA loan and then defaulted[5]. The private lenders then foreclosed and collected any deficiencies from the VA as guarantor. See generally 38 U.S.C. ss 1801-1833 (Supp.1991); 38 C.F.R. ss 36.4316-4319 (1990). The VA in turn sought indemnification from the veterans. The VA has intercepted tax refunds and medical disability checks to collect on deficiencies allegedly owed by veteran mortgagors under this system.

The statute and VA regulations do not establish a uniform federal procedure for foreclosure but instead contemplate application of state foreclosure law. See 38 U.S.C. s 1820(a)(6)[6]. Under Minnesota statutes, foreclosure may be done under a judicial procedure requiring notice to the mortgagor, or by advertisement

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[5] The veterans remain liable for the mortgage debt even after another party assumes the loan, unless the veteran obtains a release from the VA.

[6] See, e.g., 38 C.F.R. s 4315(b)(2) (1990) (providing that partial payments on a delinquent mortgage may be returned if "[f]oreclosure has been commenced by the taking of the first action required for foreclosure under local law").

in which case the mortgagor does not receive notice. See Minn.Stat. s 580.01 (1990); See also Norwest Bank Hastings Nat'l Assoc. v. Franzmeier, 355 N.W.2d 431, 433 (Minn.Ct.App.1984) (describing different foreclosure procedures). When the latter procedure is used, Minnesota law bars a mortgagee from obtaining a deficiency judgment because the mortgagor has no opportunity to ensure that the real estate is sold for fair value. Minn.Stat. s 582.30 subd. 2 (1990). Generally the VA uses non-judicial foreclosure because it is more efficient and less costly.

The VA urges that it has an independent right of indemnity that survives the anti-deficiency statute under Minnesota law. Alternatively, if Minnesota law precludes any type of recovery from the veteran after non-judicial foreclosure, the VA argues that its right of indemnity preempts Minnesota law[7].

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[7] Under the formal judicial foreclosure process the VA may exercise its right of subrogation to collect any deficiency. 38 U.S.C. s 1832(a)(1) (1988); 38 C.F.R. s 36.4323(a) (1990). The VA concedes that its right to subrogation does not apply here because the lender proceeded under non-judicial foreclosure. The VA's subrogation right is derivative from the lender. Because the lender loses its rights by virtue of the anti-deficiency statute, the VA's derivative rights are necessarily forfeit.

The district court recognized that the VA has a right of indemnity. This right is incorporated into the VA's regulations, 38 C.F.R. s 36.4323(e), and the Supreme Court has recognized that the VA's enabling legislation affords the VA an independent right of indemnity. United States v. Shimer, 367 U.S. 374, 387-88, 81 S.Ct. 1554, 1562-63, 6 L.Ed.2d 908 (1961). The *591 VA urges that this right is independent of and superior to the state anti- deficiency statute.

The district court denied the VA's claims under the authority of Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir.1990). In Whitehead, a similar class suit brought against the VA, the Ninth Circuit faced the identical issue although under Washington law. The court found no federal preemption because Washington foreclosure law was not inconsistent with federal law[8]. However, the court found that the VA forfeited its indemnity rights along with its subrogation rights when it opted to use foreclosure by advertisement. In doing

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[8] The court stated: Because it provides an alternative which allows the VA to exercise its primary right to subrogation and receive the full measure of protection without displacing state law, the Washington scheme is consistent with federal law. The federal regulations protect the VA's ability to collect deficiencies remaining after foreclosure by providing both a right to subrogation and a right to indemnity. Id. at 1369.

so, the Ninth Circuit characterized the VA's statutory right of subrogation as its primary right[9]. The court observed:

Because the VA directs the lender's choice between the two methods available in Washington, it is in complete control of its ability to be made whole. Given the availability of the judicial foreclosure alternative, which allows the VA to exercise its primary right to subrogation and proceed directly against the debtor, the VA may not choose the non-judicial foreclosure alternative, and then resort to its right to indemnity. The federal statutory and regulatory scheme contemplates reliance on state foreclosure procedures. Where state procedures preclude holding the debtor personally liable, the VA retains its right to do so by way of indemnity. Where, as in the state of Washington, state foreclosure procedures afford the VA

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[9] In contrast, the court observed that when a state anti-deficiency law precludes collection of a deficiency even by way of subrogation, the VA may exercise its independent indemnity right, which under principles of preemption displaces the effect of state law. See id. at 1368-69 (distinguishing United States v. Rossi, 342 F.2d 505 (9th Cir.1965) (applying California law), and McKnight v. United States, 259 F.2d 540 (9th Cir.1958) (same)).

identical protections, there is no conflicting state law to displace. Id. at 1369.

The Whitehead court reasoned: Allowing the VA to ignore Washington law "would disrupt commercial relationships predicated on state law." [United States v.] Kimbell Foods, 440 U.S. [715] at 729, 99 S.Ct. [1448] at 1459 [59 L.Ed.2d 711 (1979)]. In adopting the dual foreclosure scheme, the Washington legislature balanced the debtors' and lenders' rights. See Donovick v. Seattle-First Nat'l Bank, 111 Wash.2d 413, 757 P.2d 1378, 1379-80 (1988) (en banc). "Non-judicial foreclosure obviously provides significant advantages to a creditor seeking to liquidate security for a defaulted loan; these advantages have been conferred by the legislature in return for the creditors' relinquishment of the right to obtain a deficiency judgment." United States v. Vallejo, 660 F.Supp. 535, 538 (W.D.Wash.1987). Allowing the VA to instruct lenders to foreclose non- judicially under Washington law, and then use its federal right to indemnity to override the consequences of that instruction, circumvents the balance the state legislature intended in designing and adopting the two foreclosure options. Id. at 1372.

The district court applied the reasoning in Whitehead and issued an injunction barring the VA's recovery. We must respectfully disagree with this analysis. First, we cannot agree with the Whitehead premise that when the state provides dual foreclosure procedures the judicial foreclosure procedure is primary and the non-judicial procedure is secondary. No rationale exists for this conclusion. Each foreclosure process stands on its own footing and provides different consequences. As the Ninth Circuit observed, the non- judicial procedure contains significant advantages to *592 the creditor, but the debtor's interest is protected by relinquishment of the right of the creditor to obtain a deficiency judgment. Id.

The Whitehead court concluded that the federal right of indemnity cannot override the state interest in protecting the debtor under the anti-deficiency law. Beyond the state law provision that subrogation rights are lost in non- judicial foreclosure, the court further found that the VA's independent right of indemnity somehow disappears as well. The Whitehead court apparently

found the indemnity right subsumed in the VA's right of subrogation[10].

Although Minnesota and Washington law are identical in providing both a judicial foreclosure procedure, which would preserve the VA's right of subrogation against the veteran, and a non-judicial foreclosure procedure, under which no deficiency judgment may be obtained, Minnesota law affirmatively recognizes that rights of third parties under contracts of guaranty survive the anti-deficiency laws of Minnesota.

In Victory Highway Village, Inc. v. Weaver, 634 F.2d 1099 (8th Cir.1980), we held that Minnesota's anti-deficiency statute did not discharge the liability of a guarantor of a Small Business Administration (SBA) loan after the SBA foreclosed by advertisement. Id. at

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[10] The Whitehead court placed great emphasis on the fact that the VA has total control over the type of foreclosure used so it can preserve its right to a deficiency by ordering judicial foreclosure. The court deemphasized the VA's indemnity right, finding that right important only when subrogation is not available. 904 F.2d at 1369. In light of Shimer the court's finding is arguable. Shimer makes clear that indemnity is an independent remedy. The Whitehead court provided no support for its conclusion that the VA's indemnity right was essentially a backup for subrogation. By requiring the VA to choose a foreclosure route and accept the state law consequences, the Whitehead court chose to limit the VA's remedies and effectively nullify the VA's right to indemnity.

1102-03; see also National City Bank v. Lundgren, 435 N.W.2d 588, 591-92 (Minn.Ct.App.1989) (citing with approval the Victory Highway court's interpretation of Minnesota law). The principle behind the Victory Highway decision is that Minnesota's anti-deficiency statute does not extinguish claims by the mortgagee based on rights derived from sources other than the mortgage. The language of the statute addresses only the rights between mortgagor and mortgagee. Thus, the mortgagee's claim against the VA as guarantor survives non-judicial foreclosure.

It follows that the VA's indemnity right also survives foreclosure by advertisement. The indemnity contract is essentially a third-party guarantee. The guaranty agreement and associated right to indemnification constitute a third-party contract between guarantor and mortgagor, and this relationship is not covered under plain language of Minnesota's anti-deficiency statute. The principle of the statute also does not apply because, as was the guarantee agreement in Victory Highway, the VA's right to indemnity derives from a contract independent of the mortgage. As indemnitor the veteran is in the same position as the guarantor: accordingly we conclude that Minnesota law does not impair the VA's

right of indemnification and we conclude there is no need for finding federal preemption.

LACK OF NOTICE

The indemnity agreement imposes a heavy obligation on the veteran, one that weighs even heavier when the veteran allows a purchaser to assume the VA loan and does not obtain a release from the VA[11]. *593 The veteran then cannot ensure that the new owner will comply with the mortgage covenants, yet the veteran is still liable upon the new owner's default. This unenviable situation is exacerbated when the veteran receives no notice of foreclosure and cannot ensure that

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[11] We note that Congress has recently changed the program to effectively eliminate the need for the VA to obtain indemnity from the mortgagor. The VA has in fact embarked on a substantial program to release veterans from deficiencies and Congress has since changed its program to eliminate the need to collect deficiencies. A veteran may request a waiver of liability on the ground that he is not materially at fault for the deficiency and that imposing liability would be unconscionable. 38 U.S.C. s 3102(b) (1988). Also, as of 1990 Congress has increased the loan fee payable by the veteran at closing. Payment of that fee releases the veteran from liability for any deficiency except for cases of fraud, misrepresentation or bad faith. See Veteran's Benefits Amendments Act of 1989, Pub.L. No. 101-237, 1989 U.S.Code Cong. & Admin.News (103 Stat.) 2069-78 (codified at 38 U.S.C ss 1801-34). These changes, however, do not affect the obligations of mortgagors under loans closed prior to 1990.

fair value is received, nor can the veteran redeem if he is unaware of the sale.

Although perhaps this scheme is enforceable as between private parties, government participation in this type of foreclosure procedure raises serious due process questions[12]. "For more than a century the central

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[12] Most state courts considering due process challenges to non-judicial foreclosure statutes have upheld the procedure on the ground that there is no state action. See, e.g., Homestead Savs. v. Darmiento, 230 Cal.App.3d 424, 281 Cal.Rptr. 367 (1991); National Airport Corp. v. Wayne Bank, 73 Mich.App. 572, 252 N.W.2d 519 (1977); Coffey Enters. Realty & Dev. Co. v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975). In the present case state action is supplied by the VA's involvement in ordering foreclosure. See Whitney, 602 F.Supp. at 733 n. 11. The Minnesota Court of Appeals confronted the worst case scenario involving Minnesota's non-judicial foreclosure procedure in In re Strawberry Commons Apartment Owners Ass'n 1, 356 N.W.2d 401 (Minn.Ct.App.1984). The owner of a condominium sold the unit on a contract for deed and the purchaser rented out the property. The property was foreclosed by advertisement for failure to pay association fees, and neither the original owner nor the purchaser received notice. The property sold at auction for only five percent of its net value. Id. at 403. The court noted that "the right of redemption was a hollow one" because the owner was unaware the property had been sold. Id. at 405. Although the court did not reach the due process issue it invalidated the foreclosure "under the particular facts of th[e] case." Id. The Minnesota Supreme Court, without addressing the state action requirement, has held that a hearing is not required prior to non-judicial foreclosure. Guidarelli v. Lazaretti, 305 Minn. 551, 233 N.W.2d 890, 892 (1975). However, the Minnesota courts apparently still have not decided the issue posed in Strawberry Commons--whether due process consideration under Minnesota law requires notice to the owner of the property prior to non-judicial foreclosure.

meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order to be heard they must first be notified.' " Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1971) (quoting Baldwin v. Hale, 1 Wall. 223, 233, 17 L.Ed. 531). In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the Court held that any state action that will affect a property interest requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections." Id. at 314, 70 S.Ct. at 657.

A highly relevant case following Mullane is Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). In that case the Court considered an Indiana statute that allowed the state to foreclose for delinquent property taxes without notice to the mortgagee. Although the mortgagor received personal notice under the statute, the court held that "[s]ince a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably

calculated to apprise him of a pending tax sale." Id. at 798, 103 S.Ct. at 2711. The Court concluded that because notice by advertisement is not designed to reach those with a legal interest in the property, and because the state had an inexpensive and reliable means of reaching the mortgagee, notice by posting and publication did not satisfy the Mullane "reasonably calculated to apprise" requirement. Id. at 799, 103 S.Ct. at 2711-12.

All that was said in Adams has equal force in the present case. Indeed, if the mortgagee's interest in property merits personal notice, the mortgagor's rights would appear to require at least that amount of protection. This was the reasoning of the court in United States v. Whitney, 602 F.Supp. 722 (W.D.N.Y.1985). Addressing the same issue that is currently before us, the Whitney court found that the due process clause barred the VA from recovering a deficiency from a veteran when the VA had not made a reasonable attempt to provide the veteran with personal notice of the foreclosure sale. Although the court acknowledged that the VA's indemnity right as developed under Shimer allows the VA to recover from the veteran *594 even when the mortgagee's rights are

extinguished, the court held that "the Government's intimate complicity in the violation of defendant's statutory and constitutional rights" made that right unenforceable. Id. at 734.

The remedy in Whitney was not to require the VA to pursue judicial foreclosure procedures under New York law. Instead, the court held that the VA must ensure that the veteran receive notice prior to the foreclosure sale. Id. The VA can easily comply with this requirement because it receives notice of foreclosure from the lender and because it is likely to know the address of the original mortgagor and indemnitor. Indeed, if the VA can find these veterans to withhold their disability checks and tax refunds, it should have no difficulty notifying them of a pending foreclosure sale[13]. Requiring the VA to provide notice seems a logical and fair idea that the VA should have implemented on its own in the first place.

Although the veterans raised a due process claim before the district court, the issue was not addressed on appeal because the veterans prevailed on other grounds.

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[13] Significantly, the VA does not contend that it should not or cannot provide notice to the veterans. It argues only that it need not provide such notice.

However, without deciding whether the due process clause otherwise would be violated, we hold that the VA must make a good faith attempt to provide reasonable personal notice to the indemnitor of the foreclosure sale before it can obtain a recovery under its indemnity contract. In developing federal rules of decision we can be responsive to concerns for fairness whether or not they rise to constitutional magnitude. See Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67, 63 S.Ct. 573, 574-75, 87 L.Ed. 838 (1943) (stating that "[i]n absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards").

This rule of decision prevents frustration of the ultimate objective of the VA program, which is to provide assistance to veterans and make their lives better, not worse. The notice requirement is not difficult or expensive, so it does not impair the VA's right to indemnity. The VA may continue to follow Minnesota's non-judicial foreclosure procedure as long as it attempts to provide the indemnitor with reasonable personal notice of the foreclosure sale. Thus, the rule also is in accord with Shimer because it maintains the VA's ability to abandon its subrogation right and rely on its

indemnity right when it proceeds by non-judicial foreclosure. The rule also fulfills the veteran's expectation that he would receive notice of the foreclosure sale. Above all, the rule is fair.

Accordingly, the district court's order is modified to allow the VA to exercise its indemnity rights against the veteran after non-judicial foreclosure when the VA has made a good faith effort to provide reasonable personal notice to the veteran prior to the foreclosure sale.

The judgment, as modified, is affirmed.

Cite as: 956 F.2d 812

Ronnie G. VAIL, et al., Appellees,
v.
Edward J. DERWINSKI, or his successor, Secretary of the Dept. of Veteran's
Affairs, Appellant.
Nos. 90-5559, 91-1026.
United States Court of Appeals,
Eighth Circuit.
Feb. 10, 1992.
Appeal from the United States District Court for the District of Minnesota; Edward J. Devitt, Senior District Judge.
Patricia Mack Bryan, Washington, D.C., argued (Stuart M. Gerson, Jerome G. Arnold, Mark B. Stern and Ann Southworth, on the brief), for appellant.
David A. Leen, Seattle, Wash., argued (Douglas P. Radunz, Minneapolis, Minn., on the brief), for appellees.

ORDER

The petition for rehearing with suggestion for rehearing en banc is denied. Rehearing by the panel is also denied. The motion to certify the case to the Supreme Court of Minnesota is overruled. The panel opinion filed October 8, 1991, is hereby amended by adding footnote 11 to page 11, end of first full paragraph [946 F.2d 589, 594 (8th Cir.1991)], after the words "foreclosure sale" as follows: 11. After this opinion was filed, the government has called to our attention that 38

U.S.C. s 1832(a)(4)(A) was amended in 1987 imposing a duty on the agency to provide notification to the veteran upon a showing of default. See 38 U.S.C.A. s 3732(a)(4)(A) (1991).

APPENDIX C

Cite as: 841 F.Supp. 909

Ronnie VAIL, Richard A. Dixon, Bruce Lillquist, Larry Stanley, Daryl Y. Cooper,
and Timothy C. Gartland, on behalf of all others similarly situated
v.
Jesse BROWN, or his successor, Secretary of the Department of Veteran's Affairs[1].

No. 3-89-CV-609.
United States District Court,
D. Minnesota,
Third Division.
Jan. 14, 1994.

Veterans, who either defaulted on their Department of Veteran's Affairs (VA)- guaranteed loans or sold their homes to buyers who defaulted after assuming mortgages, brought action challenging VA's exercise of its indemnity rights following use of Minnesota's statutory nonjudicial foreclosure procedures, in the absence of prior notice to affected veterans. The District Court, Rosenbaum, J., held that: (1) existing VA procedures and regulations for providing veterans

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[1] Defendant Jesse Brown, the current Secretary of the Department of Veteran's Affairs, is substituted as defendant for Edward J. Derwinski, pursuant to Rule 25(d), Federal Rules of Civil Procedure.

with notice of foreclosure satisfied due process but current notice procedures would be modified to indicate for those veterans who had transferred property to indicate two-week period during which foreclosure proceeding was contemplated to be conducted, and (2) VA was liable for prejudgment interest on those sums improperly taken from veterans who did not receive their due process notice.

Ordered accordingly.

Douglas Paul Radunz, Radunz Law Office, Minneapolis, MN and David A. Leen, Leen & Moore, Seattle, WA, for plaintiffs.

Lonnie F. Bryan, U.S. Atty. Office, Minneapolis, MN, for defendant.

*911 ORDER

ROSENBAUM, District Judge.

This matter is before the Court on cross-motions for summary judgment, and on plaintiffs' motion for implementation of the Eighth Circuit's directives in Vail v. Derwinski, 946 F.2d 589 (8th Cir.1991), amended by, 956 F.2d 812 (8th Cir.1992)[2]. The Court heard oral

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[2] The 1992 modification added a footnote citing 38 U.S.C. s 3732(a)(4)(A). Section 3732(a)(4)(A) directs the Department of Veteran's Affairs ("VA") to notify a veteran of default on a VA guaranteed mortgage.

argument on May 7, 1993. The parties have subsequently engaged in negotiations and filed additional submissions with the Court.

I. Background

This class action[3] was commenced on September 15, 1989, by military veterans who purchased homes in Minnesota under the Department of Veteran's Affairs ("VA") home loan guarantee program. See generally, 38 U.S.C. ss 3701-3751. The plaintiff class consists of veterans who either defaulted on their own

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[3] By stipulation of the parties, and by Order dated August 21, 1990, the class was defined as: All individuals eligible for home loan guarantees or insurance proceeds pursuant to Title 38, United States Code, Chapter 37, against whom the United States or its agencies have asserted or will assert a claim pursuant to 38 CFR s 36.4323(e) or indemnity agreement, which claim has been or will be generated because of a claim paid by the United States to a lender who submitted such claims to the United States because of a mortgage foreclosure conducted in the State of Minnesota subject to the anti- deficiency provisions of Minnesota law including but not limited to Minnesota Statutes s 582.30 or former s 580.23 subd. 1, but excluding any claims based upon foreclosure of mortgages closed after December 31, 1989. This class will include the following subclasses: SUBCLASS # 1: Those individuals, included in the above class, against whom a final judgment has been entered in a court of law on such claim. SUBCLASS # 2: Those individuals, included in the above class, from whom the VA has collected monies based upon a claim under 38 CFR 36.4323(e) or written indemnity agreement, by way of voluntary payment, offset of benefits, wages, tax refunds, or other collection efforts.

VA-guaranteed loans, or sold their homes to buyers who defaulted after assuming those mortgages. This action challenges the VA's exercise of its indemnity rights following the use of Minnesota's statutory non-judicial foreclosure procedures, in the absence of prior notice to the affected veteran.

In 1990, the district court[4] granted summary judgment in favor of the plaintiffs, holding that the VA was "without authority to enforce deficiency judgments against members of the plaintiff class for loan guaranty payments made to mortgage lenders following non-judicial foreclosure of Minnesota real estate." See Vail v. Derwinski, 742 F.Supp. 1039, 1043 (D.Minn.1990). On appeal, the Eighth Circuit modified the district court's order. The Circuit Court held that the VA may exercise its indemnity rights against a veteran after non-judicial foreclosure, but only after the VA has made "a good faith attempt to provide reasonable personal notice to the [veteran] of the foreclosure sale." Vail, 946 F.2d at 594. The court held that failure to give such notice was a violation of the Due Process Clause of the Fifth Amendment.

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[4] The Honorable Edward J. Devitt, United States District Judge.

Plaintiffs now seek an order (a) implementing the Eighth Circuit's directive, and (b) establishing a system for repayment of funds by the VA to class members whose due process rights were violated by the VA's failure to provide adequate notice prior to non-judicial foreclosure. Plaintiffs also request prospective relief in the form of a permanent injunction.

II. The VA Home Loan Guarantee Program

The VA provides housing assistance to qualified veterans by providing a government guaranty for home loans made to veterans by private lenders. In the event of a default on these mortgages by a veteran or a subsequent purchaser, the lender is required to give the VA at least 30 days' notice before foreclosing on the property. 38 U.S.C. s 3732(c)(3) (1991); 38 C.F.R. s 36.4317 *912 (1993)[5]. The VA then has 15 days to instruct the lender how to proceed. 38 C.F.R. s 36.4324 (1993). The VA may either purchase the loan, or advise the lender to go forward with foreclosure. 38

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[5] The relevant VA regulations were recently amended to require the lender to provide notice of its intent to foreclose to "the original veteran-borrower and other liable obligors by certified mail within 30 days after such notice is provided to the Secretary in all cases in which the current owner of property is not the original veteran-borrower." 38 C.F.R. s 36.4317(c) (1993).

U.S.C. s 3732(c)(3) (1991). Should the VA direct the lender to proceed with foreclosure, the lender must follow the VA's instructions as to the appropriate method and timing. 38 C.F.R. s 36.4324(f) (1993). Foreclosure of the property is conducted in accordance with state law. 38 U.S.C. s 3720(a)(6) (1991). Minnesota law allows both judicial and non-judicial foreclosure. See Minn.Stat. ss 580.01, et seq., and 581.01, et seq. (1988).

The VA must reimburse the lender for certain losses, or deficiencies, following the foreclosure sale. 38 U.S.C. s 3732(c) (1993); 38 C.F.R. s 36.4321 (1993). The veteran, in turn, is obligated to reimburse the VA for any sum paid by the VA to the private lender. 38 C.F.R. s 36.4323(e) (1993). If a veteran allows a purchaser to assume the VA-guaranteed mortgage, and the purchaser defaults, the veteran remains liable for the mortgage debt and any consequent deficiency, unless the veteran obtained a release from the VA prior to the sale of the property. See 38 U.S.C. s 3713 (1993); 38 C.F.R. s 36.4323(f) (1993)[6]. The amount of the

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[6] VA Form 26-1802a, "Application for Home Loan Guaranty," completed and signed by each veteran-borrower, provides, in relevant part: As a GI home loan borrower you will be legally obligated to make the mortgage payments called for by

deficiency chargeable to the VA on its guaranty, and therefore recoverable from the veteran, is the difference between the sale price of the property and the amount of the loan, up to the amount of the guaranty. 38 U.S.C. s 3732(c) (1991). Once the debt is established, the VA deducts the amount of such debt from funds owed to the veterans by the United States. See Vail, 946 F.2d at 590.

Section 3732(a)(4)(A), Title 38, United States Code, directs the VA, upon receiving notice of the lender's intent to foreclose, to "provide the veteran with information and, to the extent feasible, counseling regarding ... alternatives to foreclosure ... including possible methods of curing the default, conveyance of the property to the [VA] by means of a deed in lieu of foreclosure ... and what the [VA's] and the veteran's liabilities would be with respect to the loan in the event of foreclosure." 38 U.S.C. s 3732(a)(4)(A) (1993) (effective March 1, 1988).

Before the VA can collect a debt arising from its guaranty payment, a veteran may challenge the existence

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your mortgage loan contract. The fact that you dispose of your property after the loan has been made WILL NOT RELIEVE YOU OF LIABILITY FOR MAKING THESE PAYMENTS.

or amount of the debt, or the veteran may request a waiver on the ground that he or she is not materially at fault, or that collection would violate equity and good conscience. See 38 C.F.R. ss 1.911, 1.912 (1993). The veteran is entitled to a hearing on the waiver request, and may appeal an adverse decision to the Board of Veterans Appeals. Id. The veteran may then seek further review before the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit. 38 U.S.C. ss 7252, 7293 (1993). If a waiver is denied, the veteran may seek to compromise the debt with the VA. 38 C.F.R. s 1.970 (1993).

With this overview in mind, the Court now turns to the question at hand.

III. Analysis

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court finds

that no outstanding issues of material fact preclude summary judgment in this action.

The Fifth Amendment requires that, before a federal agency may take an action which affects a constitutionally-protected *913 interest in life, liberty, or property, "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972). Such notice is to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." Vail, 946 F.2d at 593 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)); see also Mennonite Board of Missions v. Adams, 462 U.S. 791, 798, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180 (1983). It is "fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " Fuentes, 407 U.S. at 80, 92 S.Ct. at 1994 (citing Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). "Notice by mail or

other means as certain to ensure actual notice is a minimum precondition to a proceeding which will adversely affect the liberty or property interest of any party ... if its name and address are reasonably ascertainable." Mennonite Board, 462 U.S. at 800, 103 S.Ct. at 2712 (emphasis provided).

The Court recognizes that "due process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). To determine what process is due before official action is taken, the Court weighs several factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Zinermon v. Burch, 494 U.S. 113, 127, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990) (quoting Eldridge, 424 U.S. at 335, 96 S.Ct. at 903).

A veteran-borrower has a protectible interest in attempting to avoid a determination that foreclosure is necessary, and in assuring that fair value is received for the property at the foreclosure hearing. See Vail, 946 F.2d at 593; Boley v. Brown, 10 F.3d 218 (4th Cir.1993). Accordingly, on review of this case, the Eighth Circuit held that the VA must make a good faith attempt to provide reasonable personal notice of the foreclosure sale to the veteran- borrower before it may recover under its indemnity contract. Plaintiffs argue that reasonable notice requires that the veteran be personally served in advance with notice of the date and time of the foreclosure sale. Plaintiffs also urge that the VA must either hold an administrative hearing at which a veteran may present his or her objections, or direct the private lender to conduct a judicial foreclosure. Plaintiffs also seek an order from this Court which would allow an affected veteran to be advised by legal counsel at this proposed suggested hearing.

The government responds that it has made a "good faith attempt to provide reasonable personal notice" to the plaintiffs. See Vail, 946 F.2d at 594. In their view they have done so, because the Minnesota Supreme Court has held that Minnesota's non-judicial foreclosure statute is

constitutional. See Guidarelli v. Lazaretti, 305 Minn. 551, 233 N.W.2d 890, 892 (1975). The Court cannot agree. As a preliminary matter, this argument wholly ignores the Eighth Circuit's holding in Vail. Furthermore, the simple fact is that, while a procedure may be constitutional, such a determination does not respond to the question of whether adequate notice of the use of the procedure and its consequence has been given.

Alternatively, the government argues that even if the non-judicial foreclosure statutes standing alone do not satisfy due process requirements, those statutes, combined with now-existing federal statutes and regulations, collectively satisfy due process. In the government's view, current notice procedures, which advise the veteran-borrower of the pendency of foreclosure and its consequences, are sufficient.

The Court finds that existing VA procedures and regulations satisfy due process. *914 The notification currently provided by the VA to the veteran- borrower advises the veteran of the pendency and probability of the foreclosure action, as well as his or her potential liability under the guaranty contract. Veterans in possession of the mortgaged property are provided VA

Form 26-8761, "Notification to Borrower of Default," which advises a veteran-borrower that the mortgage loan is in default[7]. The veteran is then provided a VA Form 26-8762, "Notice to Borrower Regarding Foreclosure of Mortgage," which advises the veteran-borrower that the loan is in default, and that the holder of the mortgage intends to foreclose on the property[8].

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[7] VA Form 26-8761 reads: The representative of the holder of your mortgage has notified us that the above numbered loan is in default. It is very important that you see the representative immediately, if possible.... If you fail to pay the past-due installment promptly or make other satisfactory arrangements with the holder, no doubt foreclosure action will be started. In that event you will lose your property. Also, since we guaranteed payment of a portion of the loan, we may be called upon to pay a claim if the property does not sell for enough at the sale to pay the loan balance plus foreclosure costs. If we have to pay a claim, you may be liable to us for payment of the claim....

[8] VA Form 26-8762 provides, in pertinent part, as follows: We have been notified by the holder of the mortgage on your property that your loan is in default and that the holder intends to foreclose. We are sure that you recognize the importance of taking care of the delinquent payments on your loan without delay. First, unless you are able to make satisfactory arrangements for curing the default, you will lose your property and your credit will be seriously affected. In addition, if the Government is required to pay a claim on the loan, any amount paid to the holder in your behalf will represent a debt which you owe the government. This is true even though the holder of your loan does not or may not be able to hold you personally liable for any deficiency existing after completion of the foreclosure sale. Under the law we are required to make every effort to collect an indebtedness arising from the payment of a claim on a GI loan. We urge you to contact or write your mortgage holder

A veteran who transferred his or her property is sent VA Form 26-251, the so-called "Whitney letter,"[9] which notifies the veteran that the present owner of the mortgaged property is in default, and that foreclosure appears probable[10]. These notification procedures

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immediately and make arrangements satisfactory to the holder to bring your account up to date. Should you be unable to make arrangements with the holder to reinstate your loan, and would like to discuss the default with us, please write or visit with us at the above address, or telephone us at the number shown below. We may be able to help you work out a repayment program acceptable to the mortgage holder....

[9] In United States v. Whitney, 602 F.Supp. 722 (W.D.N.Y.1985), the court held that the due process clause barred the VA from recovering a deficiency when the VA had not made a reasonable attempt to provide the veteran with personal notice of the foreclosure sale. Although the plaintiffs raised a due process issue before the district court in the present case, it is notable that the notice issue was not argued on appeal, the district court having granted relief on an alternate theory. See Vail, 946 F.2d at 594. Consequently, the Eighth Circuit did not consider the constitutional sufficiency of VA Forms 26-8761 and 26- 8762, or the Whitney letter.

[10] The "Whitney letter" states in full: We have been informed by [holder] that [present owner] is delinquent with the payments on his/her loan. Foreclosure appears probable on his/her property located at [address]. The original loan was guaranteed or insured by the Veteran's Administration. Our records show that you are a former owner of the property and an obligor who is liable on the loan. If, as the result of foreclosure, or otherwise, we pay a claim under the guaranty, you may be indebted to the United States for the net amount of such payment. This is true even though the holder of the loan does not or may

provide notice of foreclosure and its attendant consequences at "a meaningful time and in a meaningful manner." See Fuentes, 407 U.S. at 80, 92 S.Ct. at 1994.

The plaintiffs' suggestion of notice of the exact time and place of the foreclosure is overly simplistic. The reality of legal practice and the vagaries of the financial system make such precision unrealistic. Any continuance or delay in a scheduled foreclosure would presumably require new notice and recommence the notice procedure. The Court cannot blind its eye to the fact that in the real commercial world, a foreclosure sale may not take place on the exact date and time when the action is contemplated. The issue for concern by the courts--and the real matter of concern for the veteran--is practical, timely, usable, notice of the fact of an

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not be able to hold you personally liable for any deficiency existing after the completion of the sale. Under the law we are required to make every effort to collect an indebtedness arising from the payment of a claim on a GI loan. We recommend that you get in touch with the holder of the loan and the present owner of the property in an effort to cure the default and avoid foreclosure of the loan. You may consider it advisable to consult a lawyer for advice as to what you can and should do. If you propose to do anything to protect your interests, it must be done promptly.

impending foreclosure with its attendant risks and consequences.

To accommodate this reality, the Court directs that the VA Form 26-8762, or the Whitney letter, henceforth be modified to indicate a two-week period during which a foreclosure proceeding is contemplated to be conducted, and that it be sent to the veteran at his or her last known address by commercially reasonable means, which includes registered mail. Such notice shall be sent not more than 60 days, nor fewer than 20 days, before the anticipated foreclosure proceeding.

The Court makes clear, however, that while the current VA Form 26-8762 and Whitney letter do not contain notice of a two-week window for the foreclosure sale, the VA is deemed to have complied with due process if it made a good faith attempt to send such forms as currently written.

In many circumstances, the Due Process Clause also requires some kind of a hearing before the state may deprive a person of liberty or property. See, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30

(1978); Fuentes, 407 U.S. at 80-84, 92 S.Ct. at 1994-96. The Court finds that a hearing is not, however, required in this case. The notice given, under the terms of this Order, is fully sufficient to permit the veteran to participate in the foreclosure sale and to exercise his or her pre-foreclosure options. In the Court's view, these procedures satisfy the requirements of the Fifth Amendment.

IV. Refunds

The plaintiffs argue that all of the class members from whom money was collected or benefits withheld are entitled to relief. Plaintiffs assert that the VA has failed to establish that any class member received appropriate notice of the foreclosure sale, or had sufficient opportunity for a hearing. In the plaintiffs' view, the Court should therefore declare all former indemnity claims void, and order that any funds collected be returned to the plaintiffs with pre-judgment and post-judgment interest. Plaintiffs suggest that the Court adopt an implementation plan similar to that set forth in Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir.1990), overruled by Carter v. Derwinski, 987 F.2d 611 (1993). The government responds that only a portion of the class may be entitled to relief. The VA claims that it

sent VA Form 26- 8762, or a Whitney letter, to some class members, and that others received actual notice of the foreclosure sale by other means. According to the VA, these individuals would be ineligible for relief. The Court agrees.

The Court concludes that any veteran to whom the VA sent appropriate notice is not entitled to recovery. Moreover, while the VA asserts that certain class members received actual notice of foreclosure, the Court has no evidence from which to determine the precise nature or the adequacy of said notice anent the veteran's possible obligation for a deficiency. Therefore, the administrative hearing to be held hereunder shall include an explicit finding on this subject.

The determination of which, if any, of the plaintiff class received conforming notice of the pending foreclosure by VA Form 26-8762 or by Whitney letter, or had actual notice of foreclosure, depends on each individual plaintiff's facts and circumstances. The Court directs that counsel for the parties jointly prepare a notice to the members of the class advising them of this decision. The notice shall inform them that in the event they have not been provided notice in accordance with this Order, they may be entitled to remission *916 of any debts

incurred or possible return of any funds of which they have been deprived. Counsel are also directed to prepare a form on which the plaintiffs may submit their claim. Review of plaintiffs' submissions and relief in accordance with this Order shall be made through the administrative apparatus of the VA. During this review process, the burden shall be on the VA to demonstrate that it has complied with due process as set forth herein.

V. Redefinition of the Class

In view of the Eighth Circuit's opinion, and the Court's ruling herein, the definition of the class shall be amended to limit the class to those veterans to whom the VA did not attempt to send VA Form 26-8762, a Whitney letter, or equivalent notice, and who did not otherwise receive actual prior notice of the foreclosure sale[11].

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[11] Accordingly, the revised definition of the class reads: All individuals eligible for home loan guarantees or insurance proceeds pursuant to Title 38, United States Code, Chapter 37, against whom the United States or its agencies have asserted, or will assert, a claim pursuant to 38 CFR s 36.4323(e) or indemnity agreement, which claim has been or will be generated because of a claim paid by the United States to a lender who submitted such claims to the United States because of a mortgage foreclosure conducted in the State of Minnesota subject to the anti- deficiency provisions of Minnesota law including, but not limited to, Minnesota Statutes s 582.30, or former s 580.23 subd. 1, but excluding any claims based upon foreclosure of mortgages closed after December 31, 1989, where the VA did not attempt to send

VI. Award of Interest

Plaintiffs argue that they are entitled to pre-judgment and post-judgment interest on any monies recovered from the VA. The government opposes any award of pre-judgment interest.

With respect to pre-judgment interest, the Supreme Court has held that, "apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent ... by Congress,' interest does not run on a claim against the United States." Library of Congress v. Shaw, 478 U.S. 310, 317, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986) (internal citations omitted). The "constitutional requirement" arises in a Fifth Amendment taking where a court might determine that "just compensation" includes reasonable interest. Id. at 317, n. 5, 106 S.Ct. at 2963, n. 5 (citing Smyth v. United States, 302 U.S.

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such veteran VA Form 26-8762, the Whitney letter, or equivalent notice, and who did not otherwise receive actual prior notice of the foreclosure sale. This class will include the following subclasses: SUBCLASS # 1: Those individuals, included in the above class, against whom a final judgment has been entered in a court of law on such claim. SUBCLASS # 2: Those individuals, included in the above class, from whom the VA has collected monies based upon a claim under 38 CFR 36.4323(e) or written indemnity agreement, by way of voluntary payment, offset of benefits, wages, tax refunds, or other collection efforts.

329, 353-54, 58 S.Ct. 248, 252, 82 L.Ed. 294 (1937); Albrecht v. United States, 329 U.S. 599, 605, 67 S.Ct. 606, 609, 91 L.Ed. 532 (1947)). An award of interest may also be appropriate where the government has "cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." Id. (citing Standard Oil Co. of New Jersey v. United States, 267 U.S. 76, 79, 45 S.Ct. 211, 212, 69 L.Ed. 519 (1925)); Loeffler v. United States, 486 U.S. 549, 554-56, 108 S.Ct. 1965, 1969, 100 L.Ed.2d 549 (1988) ("By launching 'the Postal Service into the commercial world,' and including a sue and be sued clause in its charter," Congress waived the Postal Service's immunity from interest awards); National Home for Disabled Volunteer Soldiers v. Parrish, 229 U.S. 494, 33 S.Ct. 944, 57 L.Ed. 1296 (1913) (upheld interest award in favor of building contractor against eleemosynary agency caring for veterans).

First, plaintiffs maintain that the Fifth Amendment exception to the no-interest rule applies. In this regard, they are incorrect. The Fifth Amendment exception has been applied only to eminent domain cases, where the theory of recovery is that property was taken without "just compensation." See Smyth, 302 U.S. at 353, 58

S.Ct. at 252; Albrecht, 329 U.S. at 605, 67 S.Ct. at 609; Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937). Plaintiffs do not rely on the *917 proposition that property was taken without "just compensation"; rather, they claim that they were deprived of property without due process. Therefore, the Fifth Amendment exception to the no-interest rule is inapplicable here.

Plaintiffs, however, quite properly invoke the "commercial activity" exception recognized in Loeffler and National Home for Disabled Volunteer Soldiers v. Parrish. It is disingenuous for the VA to deny that their home loan guarantees are not a commercial activity. The VA fully expects that both the veteran and a commercial lender will rely on the guaranty. This reliance is heightened when the loan guaranty is permitted to be transferred to any purchaser who assumes the VA loan. This transferability undermines any suggestion that the VA loan is personal to the veteran. The veteran, the mortgage lender, and any mortgage assumption successor all properly, and foreseeably, rely on this commercial activity. The Court, therefore, finds that the VA is liable for pre-judgment interest on those sums improperly taken

from eligible veterans under the terms outlined in this Order. Accord, New York Guardian Mortgagee Corp. v. Cleland, 473 F.Supp. 422, 436 (S.D.N.Y.1979). Finally, plaintiffs are entitled to post-judgment interest, pursuant to 28 U.S.C. s 1961(a).

VII. Conclusion

For the reasons set forth above, and based on the files, records, and proceedings herein, IT IS ORDERED that:

1. The plaintiff class is redefined as set forth above.

2. From the date of this Order, the VA shall be entitled to seek indemnity only against those veterans to whom it provided notice in accordance with this Order.

3. The VA shall cease any collection activities against veterans to whom the VA failed to provide notice in accordance with this Order.

4. The VA shall remit to each class member who is entitled to recover pursuant to this Order, any amounts withheld from such class member, or paid to the VA by such class member, plus pre-judgment and post-judgment interest thereon.

5. Counsel shall submit to this Court for review a notice, in plain English, to the members of the class as set forth herein, on or before February 15, 1993.

6. The VA shall make available its administrative review channels in order to determine which class members are entitled to relief, as set forth herein.

7. The Court remands this matter to the magistrate to determine whether, and to what extent, the plaintiffs are entitled to attorneys' fees and costs.

8. Insofar as either party seeks relief other or different than is granted herein, such relief is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX D

39 F.3d 208

(Publication page references are not available for this document.)
Ronnie G. VAIL; Richard A. Dixon; Bruce Lillequist; Larry Stanley; Daryl L.
Cooper; Timothy C. Gartland, on behalf of all others similarly situated,
Plaintiffs-Appellants/Cross-Appellees,
v.
Jesse BROWN, or his successor, Secretary of the Department of Veteran's
Affairs, Defendant-Appellee/Cross-Appellant.
Nos. 94-1858, 94-1860.
United States Court of Appeals,
Eighth Circuit.
Submitted Oct. 12, 1994.
Decided Nov. 2, 1994.

Veterans brought class action against Secretary of Department of Veterans Affairs (VA) challenging VA's action seeking deficiency judgments following foreclosure on veterans' homes. The United States District Court for the District of Minnesota, 742 F.Supp. 1039, entered summary judgment in favor of veterans, and Secretary appealed. The Court of Appeals, 946 F.2d 589, modified and affirmed as modified and remanded to district court. On remand, the District Court, James M. Rosenbaum, J., 841

F.Supp. 909, revised its earlier opinion, and veterans appealed. The Court of Appeals, Lay, Senior Circuit Judge, held that VA, as prerequisite to recovering former veterans on indemnity contracts which they executed under the VA home guaranty program, did not have to provide veterans with structured hearing regarding their deficiency debt.

Affirmed.

Davis A. Leen, Seattle, WA, argued, for appellants.

Jennifer H. Zacks, Dept. of Justice, Washington, DC, argued, for appellee.

Before BOWMAN, Circuit Judge, LAY, Senior Circuit Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge.

LAY, Senior Circuit Judge.

This case involves a class action brought by military veterans who purchased homes under the Veterans Administration home loan guaranty program. It was originally argued before our Court on June 12, 1991. This Court's opinion modifying the district court's judgment was filed October 8, 1991. See Vail v. Derwinski, 946 F.2d 589 (1991) as amended, 956 F.2d 812 (8th Cir.1992). Without discussing the constitutional arguments submitted, we held that before the VA could obtain a recovery from a veteran under its

indemnity contract, the VA must make a good faith attempt to provide reasonable personal notice to the indemnitor of the foreclosure sale. Id. at 594. On remand, the district court revised its opinion, 841 F.Supp. 909. This is an appeal from the district court's new order[1]. The veterans challenge that portion of the district court's order that holds the veterans, although entitled to notice, are not entitled to a structured hearing regarding the deficiency debt.

In denying a hearing, the district court stated: The Court finds that a hearing is not, however, required in this case. The notice given, under the terms of this Order, is fully sufficient to permit the veteran to participate in the foreclosure sale and to exercise his or her pre-foreclosure options. In the Court's view, these procedures satisfy the requirements of the Fifth Amendment.

We agree with the reasoning of the district court.

AFFIRMED.

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[1] The VA filed a timely cross-appeal on March 24, 1994. Fed.R.App.P. 4(a)(3). The VA voluntarily withdrew its cross-appeal on June 16, 1994.

APPENDIX E

STATUTES AND REGULATIONS INVOLVED

1. Amendment V to the Constitution of the United States provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law;...

2. Minnesota Statutes Annotated §580.225 provides, in part:

> The amount received from foreclosure sale under this chapter is full satisfaction of the mortgage debt...

3. 38 U.S.C. 3720(a)(6) provides in relevant part:

> The acquisition of such property [by foreclosure, etc.] shall not deprive any state or political subdivision thereof of its civil...jurisdiction of, on or over such property...or impair the rights under the state or local law of any persons on such property.

38 U.S.C. 3732(a) provides:

> "[T]he administrator may . . . pay to [the lender] the guarantee not in excess of the pro rata portion of the amount originally guaranteed. If the administrator makes such a payment, the

administrator shall be subrogated to the right of the holder of the obligation to the extent of the amount paid on the guarantee."

4. 38 C.F.R. 36.4323(e) provides:

> Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. Chapter 37 shall constitute a debt owing to the United States by such veteran.

5. 38 C.F.R. 36.4320(f):

> If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, and; (i) Such minimum bid exceeds an amount which has been specified by the Administrator under paragraph (a)(1) of this section; and (ii) The holder acquires the property at the liquidation sale for an amount not exceeding the amount legally required; the holder may elect to convey the property to the Administrator pursuant to paragraph (a)(1)(ii)(A) of this section. The amount bid at the sale or the total indebtedness, whichever is less, shall govern instead of the specified amount and for the purpose of determining the Administrator's liability under loan guaranty.